

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

Internet Address: <http://www.dps.state.ny.us>

PUBLIC SERVICE COMMISSION

MAUREEN O. HELMER
Chairman

THOMAS J. DUNLEAVY
JAMES D. BENNETT
LEONARD A. WEISS



LAWRENCE G. MALONE
General Counsel

DEBRA RENNER
Acting Secretary

April 27, 1999

RECEIVED
APR 27 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Room TW - A 325
Washington, DC 20554

RE: In the Matter of Implementation of the Local
Competition Provisions in the Telecommunications Act of
1996, Inter-Carrier Compensation for ISP-Bound Traffic,
Notice of Proposed Rulemaking in CC Docket No. 99-68

Dear Secretary Salas:

The New York State Department of Public Service (NYDPS) submits this letter in reply to comments filed in response to the Declaratory Ruling and Notice of Proposed Rulemaking in the above-captioned matter. Various parties object to the Commission's tentative conclusion that the inter-carrier compensation for Internet Service Provider (ISP)-bound traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under Sections 251 and 252 of the Act.¹

Their principle objections are that: Sections 251 and 252 do not govern interstate inter-carrier compensation and, thus, cannot be applied to ISP-bound traffic; the Commission cannot delegate its authority over this interstate matter to the states; and the states lack authority to establish these interstate rates. As discussed below, they are incorrect.

¹ See, Comments of Bellsouth Corporation Bellsouth Telecommunications, Inc. at pp.4-6; Comments of Sprint Corporation at p. 6-7; Comments of Bell Atlantic on Notice of Proposed Rulemaking at p. 4; Comments of U.S. West Communications, Inc. at pp. 12-16; Comments of SBC Communications, Inc. at pp. 4-18; Comments of GTE at pp. 11-16.

No. of Copies rec'd 074
List A B C D E

The argument that Sections 251 and 252 do not apply to interstate ISP-bound traffic is inconsistent with the Commission's First Report and Order conclusion that state commission authority over interconnection agreements pursuant to Section 252 "extends to both interstate and intrastate matters."²

Therefore, the fact that the Commission believes ISP-bound traffic is largely interstate does not preclude it from determining that the Section 251/252 process should apply.³

While the parties argue that the Commission cannot delegate its interstate authority to the states, they provide no support for their position.⁴ We are unaware of any prohibition against such delegation. As Professor Davis has repeatedly noted in his treatise, the courts have readily accepted the lawfulness of agencies' delegating authority to carry out various functions (See K. Davis, Administrative Law Treatise, §§2.6, 2.7 (3d Ed. 1994 and 1998 Supp.)).

Finally, the argument that the FCC cannot delegate to the states because states lack authority to regulate interstate service is incorrect. The courts have not only acknowledged in the past that state agencies can regulate interstate activities,⁵

² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 15544 (1996); see also Id. at 15547 (Sections 251 and 252 "address both the interstate and intrastate aspects of interconnection, services, and access to unbundled elements."); Ruling and NPRM, CC Docket Nos. 96-98 and 99-68, ¶25.

³ Our initial comments rebut the argument that it is not possible to segregate ISP traffic. Therefore, the Commission's tentative conclusion to refrain from exercising the full extent of its jurisdiction is appropriate. See e.g., Illinois Bell Tel. Co. v. FCC, 883 F.2d 104, 114 (D.C. Cir. 1989) (State regulation of mixed-use Centrex service).

⁴ Although the Comments of GTE, p.15, cite to Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968), that case is not relevant to the issue of delegation. The issue in that case was whether, in the absence of diversity of citizenship, there was federal jurisdiction over claims of negligence and breach of contract in the rendition of interstate telephone services. The court determined there was federal jurisdiction because federal law, not state law, applied. There is no discussion of the ability to delegate authority.

⁵ In Pennsylvania Gas Co. v. Pub. Serv. Comm., 252 U.S. 23 (1910), the Supreme Court addressed the issue of whether the attempted regulation of the interstate sale of gas was within the

but the United State Supreme Court recently emphasized that the Commerce Clause offers no basis for impeding such regulation.⁶ A state commission's ability to regulate interstate rates, therefore, will turn on state law.⁷ Unless a specific state statute prohibits a particular state commission from setting these rates, a state commission may do so. Only in those instances where a state commission is barred by its enabling statute from setting interstate rates would the Commission be required to set those rates.

Various parties suggest, as an alternative, that the Commission allow state commissions to set the rate for inter-carrier compensation for ISP-bound traffic, provided they implement a Commission methodology.⁸ Rather than adopt this approach, which would cause needless delay, the Commission should do what it has done on various occasions. As the Commission has required state ratemaking determinations to be incorporated within interstate rates.⁹ In this instance, the Commission has

police power of the state, and concluded that the state regulation was lawful and could stand until Congress occupied the field.

⁶ See General Motors Corp. v. Tracy, 117 S. Ct. 811 (1997).

⁷ See California Coastal Comm. v. Granite Rock, 480 U.S. 572 (1987); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 718 (1985).

⁸ See Comments of the Public Utility Commission of Texas, pp. 6-7; Comments of the Association for Local Telecommunications Services, pp. 1-2, 6-7, 9-19; Comments of the Competitive Telecommunications Association, sect. II.

⁹ For example, the Commission has determined that transport and termination (reciprocal compensation) rates for local calls that cross state boundaries "should be that established by the state in which the call terminates." Administrative convenience was cited as justification. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185 (First Report and Order) 11 FCC Rcd 15499 par. 1038 (1996). Also, when an end-user pays a per-message local rate to access the IXC (Feature Group A), a credit is applied against the interstate local switching rate (interstate access charges). The credit is based on the state-approved local message rate (F.C.C. No. 1, Section 6.7.9). Further, a portion of the federal Lifeline discount is set proportional to any state-established intrastate discount (47 CAR 54 §403(c)). See also, Implementation of Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC

an option of simply continuing its policy of treating interstate ISP-bound traffic as if it were local.¹⁰ The Commission could declare that compensation rates for interstate ISP-bound traffic are equal to reciprocal compensation rates determined under Sections 251 and 252 for local traffic.¹¹ It need not delegate any additional authority to the states, nor need it impose further requirements. The states would continue to make their determinations relying upon the existing federal rules for setting transport and termination rates for local traffic.¹² The methodology for establishing costs of terminating traffic should not change merely because the jurisdictional nature of that traffic changes. This approach would further the parties' needs for certainty and permit the states to reevaluate, if necessary, the costs of terminating high volume, one-way traffic.¹³

Docket Nos. 96-98 and 99-68, at ¶ 20 (February 26, 1999) ("Ruling and NPRM") ("ESPs, including ISPs, continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs.").

¹⁰ The Commission has concluded that enhanced service providers (ESPs) can purchase services from incumbent local exchange carriers under intrastate tariffs rather than federal interstate access tariffs, even for interstate calls. In MTS and WATS Market Structure, Docket No. 78-72, 97 FCC 2d 682 (1983) (Access Charge Reconsideration Order); see also In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (ESP Exemption Order). In the Matter of Access Charge Reform, CC Docket No. 96-262; Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1; Transport Rate Structure, CC Docket No. 91-213; End User Common Line Charges, CC Docket No. 95-72, First Report and Order, 12 FCC Rcd 15982, par. 342, 16113-34 (1997) (Access Charge Reform Order), aff'd sub nom. Southwestern Bell Operating Co. v. FCC, 153 F.3d 523 (8th Cir. 1998); See Ruling and NPRM at ¶ 5.

¹¹ A similar action by the Commission was approved by the Eighth Circuit Court which found that "the Commission has appropriately exercised its discretion to require an ISP to pay intrastate charges for its line. . ." Southwestern Bell Tel. Co. v. FCC, 153 F.3d at 543 (emphasis added).

¹² See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98 and 95-195, 11 FCC Rcd 15499 at ¶¶ 1027-1119 (1996); 47 C.F.R. §§51.701-51.717.

¹³ The New York Public Service Commission has instituted such a proceeding. Case 99-C-0529, Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation, Order Instituting Proceeding to Reexamine Reciprocal Compensation

As we move into an era of rapidly evolving telecommunications competition, it is imperative that the Commission and the states develop practical solutions that will further, rather than delay, the process. The proposal to continue to use the Sections 251/252 process for setting reciprocal compensation for ISP-bound traffic is the right approach for furthering our joint commitment to competition in the telecommunications market.

Sincerely,

A handwritten signature in black ink that reads "Lawrence G. Malone /xal". The signature is written in a cursive, flowing style.

Lawrence G. Malone
General Counsel
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, NY 12223-1350

c:\wpwin\rubin\fcc99\ispcom.fcc

(issued and effective April 15, 1999).